82-1285

No._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

W.J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

RAY FRENCH,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IS A FEDERAL HABEAS CORPUS PETITIONER WHO DESIRES RELIEF GREATER THAN THAT ACCORDED BY THE DISTRICT COURT REQUIRED BY RULE 4(a)(3), FEDERAL RULES OF APPELLATE PROCEDURE, TO FILE NOTICE OF CROSS-APPEAL?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 6, 1982, rehearing *en banc* denied on December 29, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 592 F.2d 1021, reh. denied, _____F.2d_____ (5th Cir., Dec. 29, 1982). (Appendices B and C). On January 6, 1983,

the court entered an amended order denying Petitioner's suggestion or rehearing *en banc* (Appendix A). The report and recommendation of the United States Magistrate, adopted by the district court, appears as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 6, 1982. A timely filed petition for rehearing *en banc* was denied on December 29, 1982. This petition for certiorari is filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 4(a)(3), Federal Rules of Appellate Procedure, provides as follows:

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner has lawful custody of Respondent pursuant to a judgment and sentence of the 47th District Court of Potter County, Texas, in Cause No. 17,037-A, styled *The State of Texas v. Ray French.* Respondent was charged with the offense of burglary, to which he entered a plea of not guilty. Respondent was tried by a jury, which on

March 3, 1976, found him guilty of the offense charged. The jury also found two prior convictions alleged for enhancement of punishment to be true, and the court assessed Respondent's punishment at imprisonment for life. Respondent's conviction was affirmed by the Texas Court of Criminal Appeals on January 16, 1980. *French v. State,* No. 57,881. Respondent filed three applications for state writ of habeas corpus challenging this conviction, and they were denied by the Court of Criminal Appeals on June 11, 1980; October 11, 1980; and January 28, 1981. *Ex parte French,* Application No. 9228.

On January 29, 1981, Respondent filed a petition for writ of habeas corpus in the federal district court. *French v. Estelle,* No. CA2-81-016. On February 9, 1982, the district court adopted the magistrate's recommendation finding appellate counsel ineffective and granted the writ of habeas corpus. The order of the district court provided that "the State of Texas should have the opportunity to retry petitioner [Respondent herein] for the offense of burglary and, at the option of the state, with the prior convictions being alleged in the indictment for enhancement purposes." Petitioner gave timely notice of appeal. Respondent did not file notice of cross-appeal.

After Petitioner's brief was filed in the Court of Appeals, counsel was appointed for Respondent and filed a brief in his behalf. Therein, counsel argued that the evidence was insufficient to support Respondent's life sentence as an habitual offender and that "the district court's order should be modified to bar resentencing under Section 12.42(d)" (Respondent's Brief at 28). Likewise, the conclusion in Respondent's Brief stated that the order granting the writ should "be modified to preclude resentencing of Petitioner under Section 12.42(d)" (Brief at 29). In his reply brief, Petitioner pointed out that Respondent's failure to file

notice of cross-appeal barred review of his claim that the evidence was insufficient to support his life sentence (Reply Brief at 6-7). The panel opinion disposed of this point in a footnote:

> The State, relying on *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11, 96 S.Ct. 2295, 2302 n.11, 49 L.Ed.2d 49 (1976); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4, 90 S.Ct. 616, 620 n.4, 24 L.Ed.2d 593 (1970); and *Duriso v. K-Mart No. 4195*, 559 F.2d 1274, 1278 (5th Cir. 1977), contends that the question of the insufficiency of the evidence is not properly before this court, since the petitioner did not cross-appeal the district court's decision. We have consistently held, however, that an appellee, without cross-appealing, "may rely upon any basis in the record in support of the judgment," whether or not the trial court reached the issue on the merits or simply ignored it. *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1106 (5th Cir. 1981); *see also*, J. Moore, B. Ward & J. Lucas, 9 *Moore's Federal Practice* ¶204.11[3], at 4-45 (2d ed. 1982). The cases cited by the State are inapposite as they involved requests for a modification or a reversal of specific holdings by the courts below. We may affirm the district court's grant of habeas corpus relief on any ground supported by the record.

Appendix C at 8 n.5. In denying Petitioner's suggestion of rehearing en banc, which reurged this argument, the Court of Appeals held that notice of cross-appeal is not required where the record reflects "a clear violation of the law ..." (Appendix A at 3).

B. Statement of Facts

The panel opinion accurately summarizes the facts which supported the district court's grant of habeas relief.

> The petitioner was indicted for burglary. The indictment also alleged, for the purpose of enhancement of the sentence, two prior felony convictions: a 1964 conviction and a 1966 conviction, both for theft of over $50.00. A jury found the petitioner guilty of the primary offense alleged in the indictment.
>
> At the sentencing phase of the petitioner's trial, the State attempted to punish him as an habitual offender under section 12.42(d) of the Texas Penal Code, Tex. Penal Code Ann. §12.42(d) (Vernon 1974). The State introduced into evidence two pen packets from the Texas Department of Corrections. The pen packets revealed that the petitioner had been sentenced on November 25, 1974, for theft of over $50.00 and sentenced on November 9, 1966, also for theft of over $50.00. While these exhibits showed the respective dates on which the two convictions had been obtained, neither exhibit specified the date on which the peitioner had committed the offense that led to the second conviction. No other evidence was presented to the jury showing the date on which the second offense occurred. The jury found the allegations concerning the two prior convictions to be "true" and the district court sentenced the petitioner to a term of life in the state penitentiary.
>
> The petitioner's trial attorney did not complain of the State's failure to prove the date on which the second offense occurred. Similarly,

> he did not raise the issue in the petitioner's appeal to the Texas Court of Criminal Appeals. The petitioner submitted a supplemental pro se brief to the state appellate court claiming that the evidence was insufficient to support his sentence and that he had been denied effective assistance of counsel. The Court of Criminal Appeals disposed of the petitioner's claims, stating that they had examined both grounds of error and found them to be without merit. French then filed three pro se applications for a writ of habeas corpus in state court, all of which were denied.

Appendix C at 4-5.

SUMMARY OF ARGUMENT

The district court found appellate counsel ineffective and held that the State could retry Respondent as an habitual offender, again alleging the same two prior convictions for enhancment purposes. In challenging the sufficiency of the evidence on punishment on appeal, Respondent sought greater relief than that accorded by the district court, *i.e.*, that the State be barred from again using the prior conviction as to which he argued the evidence was insufficient. Thus, under well settled precedent, Respondent's failure to file notice of cross-appeal as required by Rule 4(a)(3), Federal Rules of Appellate Procedure, barred him from review of this claim. The issue in question—the applicability of double jeopardy decisions to the punishment phase of a criminal trial—is one soon to be decided by this Court in *Estelle v. Bullard*, No. 81-1774. There is, therefore, no substance to the Court of Appeals' reasoning that notice of cross-appeal is not required when there is "a clear violation of the law."

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fifth Circuit has disregarded controlling decisions of this Court and clearly misapplied a rule of appellate procedure. Further, the decision of the Fifth Circuit is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976). In the instant case, the district court found appellate counsel ineffective and held that the State could retry Respondent as an habitual offender, again alleging the same two prior convictions for enhancment purposes. In challenging the sufficiency of the evidence on punishment on appeal, Respondent obviously sought greater relief than that accorded by the court below, *i.e.*, that the State be barred from again using the prior conviction as to which he argued the evidence was insufficient. Thus, under well settled precedent, Repondent was required by Rule 4(a)(3), Federal Rules of Appellate Procedure, to file notice of cross-appeal. The parties agreed that Respondent was seeking a modification of the district court's judgment and the panel opinion seemingly so recognized:

> The magistrate should, however, have reached a determination of the petitioner's claim of insufficiency of the evidence before he considered the alleged ineffectiveness of counsel precisely because of the double jeopardy implications involved. The double jeopardy clause would prohibit the resentencing of petitioner under section 12.42(d) if the State failed to provide sufficient evidence of habitual offender status at the

> first trial. *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1981), *cert. granted*, _____U.S._____, 102 S.Ct. 2927, 73 L.Ed.2d 1328 (1982). Therefore, a decision to grant the writ on the grounds of insufficiency of the evidence as to one of the "priors" covered in his indictment would have spared the petitioner the necessity of having to go through a second enhancement to life proceeding on the basis of that prior.

Appendix C at 6-7. The Fifth Circuit also held that the failure to file notice of cross-appellee did not bar review of Petitioner's claim of insufficient evidence because the Court of Appeals "may *affirm* the district court's grant of habeas relief on any ground supported by the record." Appendix C at 8 n.5.

In *Stachulak*, the Seventh Circuit affirmed the district court's grant of habeas relief, as in this case, but refused to consider a separate ground raised by the petitioner and rejected by the district court:

> Stachulak also challenges the Sexually Dangerous Persons Act as void for vagueness and overbreadth in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses. This attack was rejected by the district court, and respondents contend that Stachulak is barred from raising the issue in this court due to his failure to maintain a cross-appeal. Initially, Stachulak had filed a cross-appeal, but on his own motion this was dismissed pursuant to Rule 42(b), F.R.A.P. Now, he relies on the rule that an appellee may urge any ground of record of the lower court's judgment. *Dandridge v. Williams*, 397 U.S. 471, 475-76, n.6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

> The judgment of the district court ordered that if the state did not bring a renewed commitment proceeding within 60 days, Stachulak was to be enlarged. If Stachulak were to prevail on his contention that the statue is unconstitutional he would be entitled to his freedom instanter and could not be subject to a renewed commitment proceeding. It is plain therefore that he is not merely attempting to support the judgment but rather to expand his rights under the decree. Accordingly, in the absence of a properly maintained cross-appeal, the statute's constitutionality is not before us.

520 F.2d at 937 (footnote omitted).

Because *Stachulak* cannot be harmonized with the instant case, this Court should grant certiorari to resolve this conflict between the circuits.

II.

RESPONDENT'S FAILURE TO FILE NOTICE OF CROSS-APPEAL BARS HIM FROM APPELLATE REVIEW OF HIS CLAIM THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN HIS LIFE SENTENCE AS AN HABITUAL CRIMINAL

The court below held in its original opinion that notice of cross-appeal is not required because its opinion merely affirmed rather than modified the judgment of the district court. There are at least two flaws in this reasoning. First, it is logically impossible for a court to "affirm" a point of law which was specifically pretermitted by the court below. Second, the result reached is at odds with any number of decisions of this Court and the Fifth Circuit. Particularly illustrative is *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), in which the district court held a surety was

entitled to exoneration but not specific performance. Even though the surety did not file notice of cross-appeal, the court of appeals concluded that specific performance was proper. In reversing the court of appeals, this Court reasoned as follows:

> The substitution of specific performance for exoneration at the instance of the surety was not in affirmance of the decree below, as if the reasons only had been changed with the decision standing firm. Alike in substance and in form there was a modification of the decree itself, the facts being found anew and differently, the law declared anew and differently, and the relief remodeled and adapted to the new law and the new facts. Without a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." What he may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."

300 U.S. at 190-91 (citation omitted).

To the same effect are *LeTulle v. Scofield*, 308 U.S. 415 (1940) and *Helvering v. Pfeiffer*, 302 U.S. 238 (1937), in which the Court held that the failure of the respondent to file cross-petition barred review of his claim that certain items were improperly excluded from taxation since that claim, if sustained, would result in greater liability than that assessed in the court below. In light of the reasoning of these cases, it is impossible to

understand the Fifth Circuit's holding that Respondent did not seek a modification of the judgment of the court below.

The amended order of the Court of Appeals denying Petitioner's suggestion of rehearing relied on dicta in *Singleton v. Wulff*, 428 U.S. 106 (1976) to the effect that a federal appellate court may resolve an issue not passed on below "where the proper resolution [was] beyond any doubt...or where 'injustice might otherwise result.'" 428 U.S. at 121. In *Singleton*, however, this Court expressly held that the Court of Appeals had erred in deciding an issue not resolved by the district court. Further, the instant case is patently *not* one in which the legal issue pretermitted by the district court is well settled. The ground upon which the Fifth Circuit granted relief involves the applicability of *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978) to the punishment phase of a criminal trial, an issue to be decided by this Court in *Estelle v. Bullard*, No. 81-1774.[1] Thus, the Fifth Circuit was clearly incorrect in asserting that there was no doubt as to the merits of this contention.

1. On January 17, 1983, the Court entered an order vacating the judgment and remanding this case to the Fifth Circuit for consideration in light of *Ex parte Augusta*, _____SW2d_____ (Tex.Crim.App. 1982).

CONCLUSION

For these reasons, Petitioner prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1116

RAY FRENCH,

Petitioner-Appellee,

versus

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

ON SUGGESTION FOR REHEARING EN BANC

(AMENDED JANUARY 6, 1983)

Before RUBIN, RANDALL and JOLLY, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for rehearing en banc is DENIED.

In its suggestion for rehearing en banc, the state reiterates its contention that under Fed. R. App. P. 4(a), this court was precluded from considering the petitioner's double jeopardy claim because of his failure to file a cross-appeal. We rejected this claim in the panel opinion, *French v. Estelle*, No. 82-1116, slip op. at 947 n.5 (5th Cir. Dec. 6, 1982), on the ground that we could *affirm* the district court's grant of habeas corpus relief on the basis of any claim supported by the record. The state maintains that we have not simply affirmed the district court's decision, but have modified that decision to enlarge the petitioner's rights under the writ. *See Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976).

We take this opportunity to elaborate further on our comments in the earlier opinion. It is well established that an appellate court is not precluded from considering an issue not properly raised below in a civil proceeding, if manifest injustice would otherwise result. In *Singleton v. Wulff*, 428 U.S. 106 (1976), the Supreme Court stated that a federal appellate court would certainly be justified in resolving an issue that was not passed on below "where the proper resolution [was] beyond any doubt ... or where 'injustice might otherwise result.'" 428 U.S. at 121 (citations omitted). In *Empire Life Insurance Co. v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir. 1972), we held that "it is well established that as a matter of discretion, an appellate court could pass upon issues not pressed before it or raised below where the ends of justice will best be served by doing so," and that this court has a "duty to apply the *correct* law." (citations omitted) (emphasis in original) *See also Thorton v. Schweiker*, 663 F.2d 1312, 1315 (5th Cir.

1981) (rule that court will not consider issue not raised below on appeal is not inflexible and gives way to prevent a miscarriage of justice); *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1101 (5th Cir. 1981) (rule that appellate court will consider only errors of which appellant specifically complains is not inflexible); *Martinez v. Matthews*, 544 F.2d 1233, 1237 (5th Cir. 1976) (rule requiring issues to be raised below "can give way when a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice").

The considerations that allow us to reach an issue not raised below also allow us to reach an issue of law in a habeas case that *was* raised below and argued and briefed to this court, where our resolution of that issue is necessary to prevent a miscarriage of justice. The state in this case failed to prove the proper chronology of the prior offenses needed to enhance the peitioner's sentence to life imprisonment under Tex. Penal Code Ann. § 12.42(d) (Vernon 1974). As discussed in our earlier opinion, the bringing of a second enhancement-to-life proceeding, under section 12.42(d) on the basis of the same "priors," would result in a clear violation of the double jeopardy clause of the United States Constitution. *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1981), *cert. granted*, _____U.S._____, 102 S.Ct. 2927 (1982). *See also Ex Parte Augusta*, 639 S.W.2d 481 (Tex. Crim. App. 1982) (en banc) (adopting the same interpretation of the Texas Constitution). If we were to refuse to affirm, on the basis of the double jeopardy claim, the district court's decision to grant the writ, we would be closing our eyes to a clear violation of the law and to a denial of the petitioner's constitutional rights.

In the contest of this appeal from the district court's grant of habeas relief, rule 4(a) does not preclude our review of the petitioner's claim. The petitioner raised this claim in both his direct criminal appeal and in the habeas corpus proceedings in state and federal court.

The district court recognized the probability of a double jeopardy violation, but granted the writ on the ground of ineffective assistance of appellate counsel. The state then filed this appeal. The petitioner did not file a cross-appeal, possibly because the writ had been granted. We note further that the petitioner was *pro se* until counsel was appointed to represent him on appeal. As we originally stated, slip op. at 947 n.5, the petitioner may urge the appellate court to affirm the district court's decision on any ground raised below. *Weingart, supra.* The only difference in this case is that the collateral consequence of affirming the writ on double jeopardy grounds prohibits the state from bringing a second enhancement-to-life proceeding on the basis of the prior conviction insufficiently proven during the first proceeding.

Under all these circumstances, where the double jeopardy violation is clear, and where we are affirming the district court's decision to grant habeas relief to a *pro se* petitioner, we hold that the failure to file a cross-appeal does not preclude our review of the constitutional claim.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1116

RAY FRENCH,

Petitioner-Appellee,

versus

W.J. ESTELLE, JR., DIRECTOR,
Texas Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 12/6/82, 5 Cir., 198____, _____F.2d_____).
(December 29, 1982)

Before RUBIN, RANDALL and JOLLY, Circuit Judges.

PER CURIAM:
(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the

petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Denise Randall

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX C

Ray FRENCH, Petitioner-Appellee,

V.

W.J. ESTELLE, Jr., Director, Texas Department of Corrections, Respondent-Appellant.

No. 82-1116.

United States Court of Appeals, Fifth Circuit.

Dec. 6, 1982.

State of Texas appealed from an order of the United States District Court for the Northern District of Texas, Mary Lou Robinson, J., granting a writ of habeas corpus to petitioner. The Court of Appeals, Randall, Circuit Judge, held that: (1) in view of fact that chronology of commission of prior felonies is an essential element of enhanced sentence statute, state's failure to introduce any evidence of date on which second prior felony alleged for purpose of enhancement was committed would result in granting writ of habeas corpus to petitioner on grounds that petitioner's life sentence was not supported by sufficient evidence, and (2) where petitioner was once subjected to an enhancement proceeding where state failed to produce sufficient evidence of habitual offender status to support a life sentence, double jeopardy clause barred second trial-like enhancement proceeding on basis of the one prior felony insufficiently proven at earlier trial.

Affirmed.

1. Criminal Law - 163

Double jeopardy clause would prohibit resentencing of a defendant under habitual offender statute if state failed to provide sufficient evidence of habitual offender status at first trial. U.S.C.A. Const. Amend. 5; V.T.C.A., Penal Code § 12.42(d).

2. Criminal Law - 161

Where a habeas corpus petitioner's allegations raised possiblity of a violation of double jeopardy clause, court must reach merits of his claim if it is to protect petitioner's right not to be subjected to hazards of trial and possible conviction more than once for an alleged offense. U.S.C.A. Const.Amend. 5.

3. Habeas Corpus - 113(12)

In reviewing habeas corpus petitioner's application for relief on grounds of insufficiency of evidence at sentencing phase, Court of Appeals is not bound by state appellate court's affirmance of sentence.

4. Habeas Corpus - 90

While a state appellate court's judgment affirming a defendant's sentence in state court is entitled to federal courts' deference, federal courts have a duty to make their own determination of sufficiency of evidence in a federal habeas corpus challenge.

5. Habeas Corpus - 113(12)

Court of Appeals' standard of review in habeas corpus proceeding of sufficiency of evidence at sentencing phase to sustain life sentence as an habitual offender is whether record demonstrates that no rational trier of fact could have found beyond a reasonable doubt facts necessary to support life sentence.

6. Criminal Law - 1202(1)

Chronology of commission of prior felonies is an essential element of enhanced sentence statute. V.T.C.A., Penal Code § 12.42(d).

7. Habeas Corpus - 85.5(15)

In view of fact that chronology of commission of prior felonies is an essential element of enhanced sentence statute, state's failure to introduce any evidence of date on which second prior felony alleged for purpose of enhancement was committed would result in granting writ of habeas corpus to petitioner on grounds that petitioner's life sentence was not supported by sufficient evidence. V.T.C.A., Penal Code § 12.42(d).

8. Criminal Law - 163

Where petitioner was once subjected to an enhancement proceeding in which state failed to produce sufficient evidence of habitual offender status to support a life sentence, double jeopardy clause barred second trial-like enhancement proceeding on basis of the one prior felony insufficiently proven at earlier trial. V.T.C.S., Penal Code § 12.42(d).

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, RANDALL and JOLLY, Circuit Judges.

The State of Texas has appealed the United States District Court's decision granting a writ of habeas corpus to the petitioner, Ray French. The petitioner requested habeas corpus relief on the grounds that he was denied effective assistance of counsel at both his state

trial and on appeal and that the state trial court's decision to enhance his sentence was based on insufficient evidence. The district court granted the writ on the claim of ineffective assistance of counsel on appeal. We affirm the district court's decision on the basis of the petitioner's claim of insufficiency of the evidence to support his sentence.

I. FACTS AND PROCEDURAL BACKGROUND.

The petitioner was indicted for burglary. The indictment also alleged, for the purpose of enhancement of the sentence, two prior felony convictions: a 1964 conviction and a 1966 conviction, both for theft of over $50.00. A jury found the petitioner guilty of the primary offense alleged in the indictment.

At the sentencing phase of the petitioner's trial, the State attempted to punish him as an habitual offender under section 12.42(d) of the Texas Penal Code, Tex. Penal Code Ann. § 12.42(d) (Vernon 1974).[1] The State in-

---

1. Section 12.42 of the Texas Penal Code, which sets forth the penalties for repeat and habitual felony offenders, provides:

> (a) If it be shown on the trial of a third-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a second-degree felony.
>
> (b) If it be shown on the trial of a second-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a first-degree felony.
>
> (c) If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years.

(footnote continued on following page)

troduced into evidence two pen packets from the Texas Department of Corrections. The pen packets revealed that the petitioner had been sentenced on November 25, 1974, for theft of over $50.00 and sentenced on November 9, 1966, also for theft of over $50.00. While these exhibits showed the respective dates on which the two convictions had been obtained, neither exhibit specified the date on which the petitioner had committed the offense that led to the second conviction. No other evidence was presented to the jury showing the date on which the second offense occurred. The jury found the allegations concerning the two prior convictions to be "true" and the district court sentenced the petitioner to a term of life in the state penitentiary.

The petitioner's trial attorney did not complain of the State's failure to prove the date on which the second prior offense occurred. Similarly, he did not raise the issue in the petitioner's appeal to the Texas Court of Criminal Appeals. The petitioner submitted a supplemental pro se brief to the state appellate court claiming that the evidence was insufficient to support his sentence and that he had been denied effective assistance of counsel. The Court of Criminal Appeals disposed of the petitioner's claims, stating that they had examined both grounds of error and found them to be without merit. French then filed three pro se applications for a writ of habeas corpus in state court, all of which were denied.

(footnote continued from previous page)

> (d) If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

Tex. Penal Code Ann. § 12.42 (Vernon 1974).

II. INSUFFICIENCY OF THE EVIDENCE.

In a carefully reasoned opinion, the federal magistrate, who originally heard the petitioner's claims, recognized that the State had failed to produce sufficient evidence of the petitioner's habitual offender status under section 12.42(d) of the Texas Penal Code, Tex. Penal Code Ann. § 12.42(d) (Vernon 1974), during the sentencing phase of the petitioner's trial. The State's evidence demonstrated that the petitioner had been convicted of the second felony after he was convicted of the first, but there was no evidence that he had *committed* the second felony after the conviction for the first became final, as required by the statute. *See Hickman v. State*, 548 S.W.2d 736 (Tex.Cr.App.1977); *Wiggins v. State*, 539 S.W.2d 142 (Tex.Cr.App.1976).

The magistrate, however, recommended that the district court grant the writ of habeas corpus on the basis of the petitioner's claim of ineffective assistance of appellate counsel, rather that on the evidentiary claim. He suggested this disposition of the case in order to avoid the double jeopardy implications involved in a finding of insufficiency of the evidence. *See Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). The district court then granted the writ on the recommended grounds, conditioned on the State's failure to demand a new trial within ninety days of its order.[2]

[1,2] The magistrate should, however, have reached a determination on the petitioner's claim of insufficiency

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2. Although the error relates to punishment only, Texas law does not allow a court to reform the sentence or remand for a new trial solely on punishment where the jury originally assessed the punishment. *Hickman v. State*, 548 S.W.2d 736 (Tex.Cr.App.1977).

of the evidence before he considered the alleged ineffectiveness of counsel precisely because of the double jeopardy implications involved. The double jeopardy clause would prohibit the resentencing of the petitioner under section 12.42(d) if the State failed to provide sufficient evidence of habitual offender status at the first trial. *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir.1981), *cert. granted*, _____U.S._____, 102 S.Ct. 2927, 73 L.Ed.2d 1328 (1982).[3] Therefore, a decision to grant the writ on the grounds of insufficiency of the evidence as to one of the "priors" covered in his indictment would have spared the petitioner the necessity of having to go through a second enhancement to life proceeding on the basis of that prior.[4] Where a habeas petitioner's allega-

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3. After our decision in *Bullard*, the Texas Court of Criminal Appeals reexamined its prior holdings and agreed that failure of proof of prior convictions at an enhancement proceeding creates a double jeopardy bar as a matter of federal law, *Cooper v. State*, 631 S.W.2d 508 (Tex.Cr.App.1982) (en banc), specifically overruling its decision in *Bullard v. State*, 533 S.W.2d 812 (Tex.Cr.App.1976), and *Porier v. State*, 591 S.W.2d 482 (Tex.Cr.App. 1980). In *Cooper*, as in French's case, the State had failed to prove the date on which the second prior felony had been committed. The Texas Court of Criminal Appeals held that this failure of proof constituted failure by the State to produce evidence sufficient to support a life sentence and that the State should be denied a second opportunity to prove what it had failed to prove initially. 631 S.W.2d at 514. Furthermore, the Court of Criminal Appeals has recently held, on facts similar to those at issue here and in *Cooper*, that the double jeopardy clause of the Texas constitution, Article I, sections 14 and 19, as well as the United States Constitution, bars a retrial at either the punishment or guilt stage of trial, where "the evidence is found lacking in the resolution of factual issues presented..." *Ex Parte Augusta*, 639 S.W.2d 481 at 485 (Tex.Cr.App. Oct. 6, 1982) (en banc). Thus, the Texas courts have held that the Texas constitution provides an independent state ground for barring the relitigation of factual issues insufficiently presented at an earlier enhancement proceeding.

4. See note 7, *infra*.

tions raise the possibility of a violation of the double jeopardy clause, the court must reach the merits of his claim if it is to protect the petitioner's right not to be "subjected to the hazards of trial and possible conviction more than once for an alleged offense," *Greene v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957), which the prosecution has initially failed to prove. *Burks, supra.*[5]

[3-5] We note at the outset that, in reviewing the petitioner's application for habeas corpus relief on the grounds of insufficiency of the evidence at the sentencing phase, we are not bound by the state appellate court's affirmance of the petitioner's sentence in *French v. State*, 592 S.W.2d 638 (Tex.Cr.App.1980). While a state appellate court's judgment affirming a defendant's sentence in state court is entitled to our deference, the federal courts have a duty to make their own determination of the sufficiency of the evidence in a federal habeas corpus challenge. *See Jackson v.*

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5. The State relying on *Federal Energy Administrative v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 N.11, 96 S.Ct. 2295, 2302 n.11, 49 L.Ed.2d 49 (1976); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n. 4, 90 S.Ct. 616, 620 n. 4, 24 L.Ed.2d 593 (1970); and *Duriso v. K-Mart No. 4195*, 559 F.2d 1274, 1278 (5th Cir. 1977), contends that the question of the insufficiency of the evidence is not properly before this court, since the petitioner did not cross-appeal the district court's decision. We have consistently held, however, that an appellee, without cross-appealing, "may rely upon any basis in the record in support of the judgment," whether or not the trial court reached the issue on the merits or simply ignored it. *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1106 (5th Cir. 1981); *see also* J. Moore, B. Ward & J. Lucas, 9 *Moore's Federal Practice* ¶204.11[3], at 4-45 (2d ed. 1982). The cases cited by the State are inapposite as they involved requests for a modification or a reversal of specific holdings by the courts below. We may *affirm* the district court's grant of habeas corpus relief on any ground supported by the record.

Virginia, 443 U.S. 307, 323, 99 S.Ct. 2781, 2791, 61 L.Ed.2d 560 (1979). Our standard of review is whether the record demonstrates that no rational trier of fact could have found beyond a reasonable doubt the facts necessary to support the life sentence. *Id.*[6]

[6-7] As the court below found, the record in this case definitively shows that the State introduced no evidence of the date on which the second prior felony alleged for the purpose of enhancement was committed. The chronology of the commission of the prior felonies is an essential element of section 12.42(d). *See Hickman, supra; Wiggins, supra.* The jury could not possibly have found the proper chronology of prior convictions required for a life sentence under section 12.42(d) where the State produced no evidence of the date on which the second felony was committed. Accordingly, we must affirm the district court's grant of habeas corpus relief, on the grounds that the petitioner's life sentence was not supported by sufficient evidence.

[8] We hold further, as required by our prior decision in *Bullard, supra,* that because the petitioner was once subjected to an enhancement proceeding where the State failed to produce sufficient evidence of habitual of-

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6. *Jackson v. Virginia* involved a challenge to a criminal conviction where the standard of proof of beyond a reasonable doubt is constitutionally mandated, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), while the petitioner here challenges the constitutionality of his sentence. The Texas courts have held, however, that the State must prove the facts necessary to support a life sentence, as well as the facts relating to the defendant's guilt, beyond a reasonable doubt. *Ex Parte Augusta, supra; Jackson v. State*, 571 S.W.2d 1, 2 (Tex.Cr.App1978). Therefore, we may assume that the *Jackson v. Virginia* standard of review is applicable to the petitioner's claim that there was insufficient evidence to support his sentence as an habitual offender under section 12.42(d).

fender status to support a life sentence, the double jeopardy clause bars a second trial-like enhancment proceeding on the basis of the one prior felony insufficiently proven at the earlier trial.[7] In light of our holding that the writ should have been granted on the grounds that there was insufficient evidence to support the petitioner's enhanced life sentence, we need not reach the question of whether French was denied effective assistance of counsel during the sentencing and appellate phases of his trial.

That portion of the district court's decision granting a writ of habeas corpus unless the State elects to retry the peitioner within ninety days is accordingly

AFFIRMED.

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7. The State, alleging that the petitioner has quite a number of prior felony convictions, seeks the opportunity to prove the commission of a different prior felony by the petitioner at a second enhancement proceeding. While none of the cases have specifically dealt with the question raised by the State, the language in the prior opinions of both this court and the Texas Court of Criminal Appeals suggests that the double jeopardy clause bars the State from bringing *any* enhancement proceeding for the purpose of obtaining a life sentence under section 12.42(d), where the State has previously failed to prove its case under section 12.42(d) in an earlier proceeding. *See Bullard*, 665 F.2d at 1349; *Ex Parte Augusta*, 639 S.W.2d at 485; *Cooper*, 631 S.W.2d at 508; *Ex Parte Martin*, _____S.W.2d_____, No. 67,540, slip op. (Tex.Cr.App. April 29, 1981) (en banc) (rehearing pending).

The State has, in effect, asked us to give an advisory opinion, since it has not yet attempted to prove these other alleged prior felonies in state court. As the State itself points out, the Texas courts have not even specifically addressed the question whether the State may subject the petitioner to a second enhancement to life proceeding on the basis of a different "prior." Accordingly, the question is more appropriately left to the state courts to determine in the first instance.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

RAY FRENCH,	§	
	§	
Petitioner,	§	
	§	
V.	§	**CA2-81-16**
	§	
W.J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,	§	
	§	
	§	
	§	
	§	
Respondent	§	

REPORT AND RECOMMENDATION

Petitioner, Ray French, is a state prisoner by virtue of judgment and sentence of the 47th District Court of Potter County, Texas, in cause number 17,075A. After trial commencing on March 3, 1976, petitioner was found guilty under an indictment charging him with the felony offense of burglary with two prior felony convictions alleged for enhancement purposes. On March 19, 1976, the trial judge sentenced peititioner to life imprisonment as an habitual criminal in Texas Department of Corrections. The Court of Criminal Appeals of Texas affirmed the conviction by its per curiam opinion *French v. State*, _____SW2d_____(No. 57,881, January 16, 1980).

Petitioner has filed application for writ of habeas corpus pursuant to 28 U.S.C. §2241, et seq. and is pro-

ceeding in forma pauperis. Liberally construing his pro se pleadings he contends that (1) the judgment and sentence in the primary case are constitutionally invalid and the evidence is insufficient to support the conviction as an habitual criminal, because the prosecution failed to prove that the second prior conviction alleged for enhancement purposes was committed subsequent to the first prior conviction alleged for enhancement purposes as required by Texas Penal Code §12.42(d); (2) he was denied effective assistance of counsel at trial because the court appointed attorney failed to require the state to produce evidence to prove that the second prior conviction used for enhancement purposes was committed subsequent to the first prior enhancing conviction; and (3) he was denied effective assistance of counsel on appeal by the failure of the attorney to raise the issue that the evidence was insufficient to prove that the second prior conviction used for enhancement purposes was committed subsequent to the first prior enhancing conviction.

The statement of facts of the trial, the transcript of all state court proceedings, and the per curiam opinion of the Court of Criminal Appeals of Texas have been filed as exhibits in this proceeding. Those records reflect that petitioner had filed, *pro se,* a supplemental brief with the Court of Criminal Appeals on direct appeal on September 28, 1979, advancing the first and third challenges which are contained in the application now before the court. The appellate court had discussed the issues raised by the attorney on appeal, but disposed of petitioner's *pro se* brief with the following notation: "Appellant also advances two *pro se* grounds of error. We have examined each and find both to be without merit."

Petitioner has filed at least three applications for writ of habeas corpus in the trial court. In the first application for writ of habeas corpus he raised the issue that the

judgment and sentence in the primary case is void for the reason that the state failed to produce evidence that the second prior conviction used for enhancment purposes was committed susequent to the time that the first prior conviction used for enhancment purposes had become final. He included in that application a brief of authorities supporting his contention. The trial judge did not address the issue raised by petitioner, but entered order on May 22, 1980, finding that "the petitioner was rendered effective assistance of counsel" and directing the clerk to forward certain records to the Court of Criminal Appeals. The Court of Criminal Appeals denied the application without written order on June 11, 1980.

Petitioner then filed application for writ of habeas corpus in the trial court, attacking the effectiveness of the attorney at trial and on appeal, because counsel did not raise the issue that the state failed to make the necessary proof that the offense which resulted in the second conviction used for enhancement purposes occurred subsequent to the date the first prior conviction became final. The trial judge entered order in identical terms with the order on the first application and on October 1, 1980, the Court of Criminal Appeals denied the application without written order on the findings of the trial court without hearing.

Petitioner's third application for writ of habeas corpus in the trial court essentially iterated the sufficiency of evidence contentions. No order was entered by the trial judge and the Court of Criminal Appeals of Texas denied the application without written order on January 28, 1981. Petitioner has exhausted available state remedies.

The indictment charged as the primary offense that petitioner had committed the offense of burglary on November 23, 1975. It alleged further that prior to

November 23, 1975, the alleged date of commission of the primary offense, petitioner had been, on November 25, 1964, in cause number 12446 in the 47th District Court of Potter County, Texas, convicted for the felony offense of theft over fifty dollars and that after the conviction in cause number 12446 had become final petitioner committed the offense of felony theft and was convicted of that offense on November 9, 1966, in cause number 1633 in the 47th District Court of Randall County, Texas.

The indictment, therefore, attempted to punish petitioner for repetition of criminal conduct as is authorized by Texas Penal Code §12.42(d), providing:

> "If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, *and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final,* on conviction he shall be punished by confinement in Texas Department of Corrections for life." (emphasis added.)

Thus §12.42(d) requires the prosecution to prove that the second previous felony conviction alleged for enhancement purposes was *committed* after the first previous conviction became final. *Porier v. State,* 591 SW2d 482 (Tex. Crim. 1979); *Hickman v. State,* 548 SW2d 736 (Tex. Crim. 1977); *Wiggings v. State,* 539 SW2d 142 (Tex. Crim. 1976). That requirement had also been the consistent holding of the Court of Criminal Appeals under former Penal Code Art. 63, the predecessor to §12.42(d). *Tyra v. State,* 534 SW2d 695 (Tex. Crim. 1976), *Kessler v. State,* 514 SW2d 260 (Tex. Crim. 1974); *Hutchinson v. State,* 481 SW2d 881 (Tex. Crim. 1972); *Lee v. State,* 400 SW2d 909 (Tex. Crim. 1966); *Rogers v. State,* 325 SW2d 697 (Tex. Crim. 1959). The construc-

tion placed by the courts of the State of Texas on Texas Penal Code §12.42(d) mandated that before the second felony conviction alleged for enhancement purposes could be so used it was necessary that proof be adduced that it was committed after the first previous conviction alleged for enhancment purposes became final.

The state failed to meet the burden. During the punishment phase of the bifurcated trial the "pen records" of the two prior convictions were received into evidence after proving identity by fingerprint comparisons. However, the indictment initiating the prosecution for each of the prior convictions was not offered into evidence nor was there any proof adduced by other means which established when each of the offenses resulting in the two prior convictions occurred. Those records reflected the dates when petitioner was convicted on each of the prior offenses, the date when he was sentenced on each of them, his admission date at Texas Department of Corrections, the date each sentence began, and the maximum and minimum expiration dates. Those records do not show, however, the crucial date which would prove that the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final.

Petitioner has been frustrated in his attempts to raise the issue in the state courts. First, the appellate court found it unworthy of discussion when he attempted to raise it, *pro se*, on direct appeal. When he tried to raise it collaterally by application for writ of habeas corpus the trial judge did not address the issue, but treated the matter as if it were an attack on the effectiveness of counsel. Even in this application for writ of habeas corpus the state has not addressed the issue. The Attorney General in brief in support of respondent's motion to dismiss has treated the issue as one covered by the *Wainwright v. Sykes* doctrine which would have re-

quired petitioner to object to the introduction of those prior convictions at the time they were offered. The defect is not in the exhibits which were received in evidence, but in the fact that there was absolutely no proof offered as to when the second prior conviction was committed. That proof is more than a mere procedural rule.

One could argue that notwithstanding that the appellate courts in Texas have construed the statute as requiring that missing proof it does not necessarily mean that the insufficiency issue here involved rises to constitutional dimensions. I am not cognizant of any case where a *Jackson v. Virginia*[1] analysis has been extended to this precise issue, although I perceive no valid basis why *Jackson v. Virginia* should not be applicable. Pretermitting resolution on that basis, and thus avoiding the concomitant problem of *Greene v. Massey*, 437 U.S. 19 (1978) which prohibits a second trial once a reviewing court determines that there was insufficient evidence to support a verdict of guilty to the charged offense, there is another reason why the application for writ of habeas corpus should be granted.

The "white horse" case in law is often discussed, but rarely found. Something approaching a white horse case exists to support the conclusion that petitioner was denied effective assistance of counsel.

As I have indicated above this case was tried on March 3, 1976. Petitioner was represented by Fred Leach, an attorney in Amarillo. The District Attorney was Tom Curtis, although one of his assistants tried the case. The trial judge was District Judge Bryan Poff, Jr.

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1. 443 U.S. 307 (1979)

On March 30, 1977, the Court of Criminal Appeals of Texas had delivered its opinion in another case from Potter County, Texas in *Hickman v. State*, 548 SW2d 736. It reversed the conviction and remanded the case on the precise issue raised by petitioner in this case, that is, that there was no evidence in the record which reflected that the offense resulting in the second conviction alleged for enhancement purposes was committed after the first enhancing conviction became final. The appeal was from Potter County, Texas, and the trial judge in that case was Bryan H. Poff, Jr., the District Attorney was Tom Curtis, and the attorney for Hickman was Fred Leach. Each of the principals (excepting the defendant) in the *Hickman* case, where the cause was reversed and remanded, is the same as in the French case. There is nothing in the *Hickman* case which indicates when that case was tried,[2] or when it was briefed on appeal, so one cannot say with authority that Leach had already tried the *Hickman* case and was thus cognizant of that precise issue at the time he tried the French case on March 3-4, 1976. However, the Court of Criminal Appeals of Texas entered order on October 28, 1977, extending to November 9, 1977, the time in which petitioner should file his brief on appeal. It entered another order on November 10, 1977, extending the time to December 1, 1977, in which the brief should be filed. *Hickman* had been decided on March 30, 1977. Thus the attorney was well aware of the possible applicability of the *Hickman* case and failed to raise that issue. The prejudice to petitioner is apparent. Although it had nothing to do with guilt or innocence on the primary case the use of that second enhancing conviction was the one thing which converted the case to one of mandatory life imprisonment from a much lesser penal sanction.

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2. However, the opinion in the Hickman case was delivered almost three years prior to the appellate opinion in the French case.

Ordinarily the effectiveness of counsel is not determined on one defect, but the full spectrum of the representation is considered. The default in this case is so critical and damaging, however, that it requires that petitioner have the requested relief.

I recommend that the application for writ of habeas corpus be granted.

The clerk is directed to file this Report and Recommendation and to send a copy of it to petitioner and a copy to the attorneys for respondent. Any party may object to the proposed findings and to the recommendation within ten days after having been served with a copy thereof. Such party shall file with the clerk of the court, and serve on the Magistrate and on all parties, written objections which shall specifically identify the portions of the findings, recommendation, or report to which objection is made and shall set out fully the basis for each such objection.

Recommended this 7th day of May, 1981.

/s/ Bill H. Brister